

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, RALPH McLERAN, CHARLES A. MURDOCK, WILLIAM H. McCARTHY, DANIEL C. MURPHY, EDWARD I. NOLAN, HENRY PAYOT, and ALEX. T. VOGELSANG, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, and JAMES ROLPH, JR., Mayor of Said City and County of San Francisco,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed

AUG 26 1915

F. D. Monckton,

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, Northern
District of California, Second Division.*

No. 21.

Division No. 2.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

**Notice of Motion [for Order Directing Payment of
Taxes, etc.].**

To Pacific Telephone and Telegraph Company,
Plaintiff in Above-entitled Action and to
Messrs. Pillsbury, Madison and Sutro, Plain-
tiff's Attorneys; To Bank of California, Na-
tional Association of San Francisco, Receiver
and Depositary of Moneys Impounded in the
Above-entitled Action:

You and each of you will please take notice that
on Monday, the 11th day of January, 1915, at the
hour of 10 o'clock A. M. or as soon thereafter as
counsel can be heard in the courtroom of the above-
entitled court and division, Postoffice Building, San
Francisco, California, the undersigned will make a
motion for an order directing the payment of taxes
and accrued penalties for delinquency, on the
moneys impounded in said action, for the fiscal year
1914-15.

Said motion will be based upon this notice, upon the files, papers and proceedings in said action, upon the [1*] affidavit of Edward F. Bryant, Tax Collector of the City and County of San Francisco, a copy of which is served herewith, and upon the further grounds that said taxes are now due and wholly unpaid, and that by reason of said nonpayment a penalty of 15% was added thereto by operation of law on the last Monday in November, 1914.

PERCY V. LONG,

City Attorney, Attorney for Tax Collector.

Dated: January 4, 1915.

Receipt of a copy of within original is hereby admitted this 4th day of January, 1915.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

THE BANK OF CALIFORNIA, National
Association,

I. F. MOULTON.

[Endorsed]: Filed Jan. 4, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

At a stated term, to wit, the November term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 15th day of February, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

*Page-number appearing at foot of page of original certified Record.

No. 21.

THE PACIFIC TELEPHONE & TELEGRAPH
CO.

vs.

THE CITY AND COUNTY OF SAN FRANCISCO
et al.

Order Granting Motion for Payment of Taxes.

The motion of the tax collector of the City and County of San Francisco for an order directing the payment of taxes and accrued penalties for delinquency, on the moneys impounded herein for the fiscal year 1914-1915; heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion thereon, it was ordered that said motion be and the same is hereby granted.

[3]

*In the District Court of the United States, Northern
District of California, Second Division.*

EQUITY—No. 21.

Hon. WM. C. VAN FLEET, Judge.

PACIFIC TELEPHONE & TELEGRAPH CO.,
Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant.

Monday, February 15, 1915.

H. D. PILLSBURY and PILLSBURY, MADISON & SUTRO, for Plaintiff.

PERCY V. LONG, City Attorney, and ROBERT M. SEARLS, Assistant City Attorney, for Defendant.

[Opinion (Oral).]

The COURT (Orally):

This is an application by the tax collector of the City and County of San Francisco that the receiver or depositary of the fund under the control of the Court in the above-entitled case be directed to pay the taxes accrued thereon.

I am unable to distinguish the case in its circumstances in any material respect from that arising on similar application recently made in the Spring Valley Cases. The fund is one which is being accumulated in the hands of the depositary bank under and by virtue of a restraining order issued in an action to have a rate-fixing ordinance avoided and held confiscatory; the order providing for a suspension of the enforcement of that ordinance during the pendency of the action, and directing that if the plaintiff collects a larger rate than that provided for in the ordinance involved the excess shall be impounded in the hands of a Special Master and kept in a depositary subject to the final determination of the litigation. The fund has been accumulating for some [3-a] time and is a considerable one,—something over \$200,000,—and the tax collector has, as in the Spring Valley Cases, returned it for assessment against the bank as receiver or depositary. I

am satisfied that it falls within the same principle that was held applicable in the Spring Valley Cases; that it is, within the provisions of the Political Code, moneys in the hands of the Court involved in litigation, and as such subject to taxation as therein provided. I held in those cases that the fund was not the property of either of the parties to the litigation other than potentially so, the title being *sub-judice*. It is a fund accumulated under the circumstances indicated and its destination is wholly subject to the final determination of the Court—that is, as to whether it is justly the property of the plaintiff or that of the consumers. It is, strictly speaking, property in litigation, and its eventual disposition and ownership cannot be determined until the final decree. But the money is nevertheless subject to taxation; it is within the district; it is a part of the property locally within the City and County of San Francisco which should pay its portion of the municipal taxes, and therefore the tax has been properly levied.

There is but one feature tending to create a distinction between the situation here and that which obtained in the Spring Valley Cases, and that is disclosed in an affidavit on behalf of the plaintiff showing that the amount of this fund has been included by it in its returns to the State for the present year for taxation purposes as a part of its gross revenue, and that consequently if this tax is permitted to prevail it will in effect be double taxation. But I am satisfied, for the reasons stated, that the fund [3-b] cannot be regarded as a part of the gross re-

ceipts of the plaintiff. However it may have been regarded by it, it is not the property of the plaintiff, and cannot now be regarded as such for the purposes of taxation; and therefore if it be true that it has been returned as a part of the gross earnings of the plaintiff it has been erroneously so returned and that fact cannot and should not affect the right of the city and county to have it listed and assessed as property subject to taxation within the municipality. If it results, as claimed, in subjecting it to double taxation by reason of the error in making such return, the plaintiff's remedy, if it eventually be determined to be its property, will be by such method as is open to have the injustice corrected, which it is not necessary to here determine.

Nor is it in any sense a tax against the bank; it is a tax against the fund. The bank is merely the instrumentality through which the fund is being preserved and held.

The application will be granted.

[Endorsed]: Filed July 6, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [3-c]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation et al.,

Respondents.

Stipulation as to Facts.

For the purposes of the determination of the application of the city attorney of the City and County of San Francisco, State of California, as attorney for the tax collector of said city and county, notice of which was given on or about the 28th day of November, 1914, for an order of the above-entitled Court directing the payment of the taxes levied and assessed against The Bank of California, National Association, as receiver and depositary of moneys in litigation in the above-entitled suit, complainant and respondents in the above-entitled action, and the said city attorney as attorney for the said tax collector, hereby stipulate and agree that the following are the material facts in the determination of said application, and that said application may be heard and determined on this stipulation.

That there are no material facts stated in the affidavit of Edward F. Bryant, upon which this motion is made, other than those herein stated.

On June 17, 1913, The Pacific Telephone and Telegraph [4] Company, a corporation, filed a bill of complaint in equity, No. 21, in the District Court of the United States, Northern District of California, Second Division, against the City and County of San Francisco, a municipal corporation, and the Mayor and Board of Supervisors of said city and county.

The bill alleged that the complainant was engaged in the business of supplying the City and County of San Francisco and its inhabitants with telephone service; that on March 3, 1913, the said Board of Supervisors passed a certain bill or ordinance, fixing the maximum rates to be charged for furnishing telephone service to the City and County of San Francisco and its inhabitants for the fiscal year commencing July 1, 1913, and threatened to enforce the same against the complainant. The complainant further alleged that said bill or ordinance, and the rates fixed thereby, were wholly void, null, grossly unjust, unreasonable, fraudulent and unconstitutional under the provisions of the Constitution of the United States, and were oppressive and confiscatory, and did not permit of or provide for a just or reasonable or fair compensation for the telephone service to be supplied during the said year by complainant to the said city and county and its inhabitants. Similar allegations were made concerning another ordinance passed by popular vote on an initiative petition on April 22, 1913, fixing another schedule of rates for such service. The Court was asked to enjoin the defendants and all

consumers of telephone service in said city and county, both pending the litigation and perpetually at its conclusion, from enforcing against the complainant the said bills or ordinances, or either of them, or the rates fixed therein.

On June 25, 1913, the District Court made a temporary [5] restraining order restraining the enforcement of these ordinances, and, as certain of the conditions thereof, provided as follows:

“2. That all compensation rates and charges collected by complainant for any telephone service in excess of the rates and charges for such service specified in the two purported ordinances first hereinabove mentioned, or in either of them, shall be paid by complainant into The Bank of California, National Association, which bank is hereby named as depositary for that purpose, such funds to be retained in a separate account designated as ‘The Pacific Telephone and Telegraph Company, Special Account,’ to bear interest, if such can be obtained, at the rate of at least two per cent (2%) per annum, but such deposit must and shall be subject at all times to the order of this Court, and shall be paid out or withdrawn only on checks signed by the special master hereinafter named pursuant to such order and countersigned by a Judge sitting in this court. All of such excess of rates collected by complainant during said calendar month shall be so deposited on or before the last day of said month.

“3. Complainant shall keep, in the City and

County, of San Francisco, full, true and correct books of account, showing in detail the name and address of each person, firm or corporation in said City and County of San Francisco, to whom telephone service is being furnished by complainant, and the amount collected during each calendar month from each of said customers for the telephone service mentioned in said two purported ordinances, or in either of them, in excess of the rates fixed for such service by said ordinances, or by either of them, and the total amount so deposited during such calendar month; said books of account shall be accessible to and open to the inspection of counsel for respondents and the master herein named, at all times during business hours, provided such inspection shall be made so as not to interfere with the ordinary course of business of complainant.

“4. In the event that it shall be finally determined in this suit that either one of said two purported ordinances is valid, legal and in force against complainant, all charges so collected for telephone service in excess of the rates specified in that one of said two purported ordinances which shall be adjudged to be in force, shall be refunded to the person or persons from whom they were collected, and the expense of preparation of all accounts and papers required to make such refund shall be borne by complainant.

“5. On or before ten days from the entry

of this order, complainant shall file herein an undertaking in the sum of Ten Thousand Dollars (\$10,000), with a surety or sureties to be approved by the clerk of this court in favor of and for the benefit of respondents and also of any person who may be injured by reason of this order, conditioned that complainant will pay to respondents, [6] and to any person who may be injured by reason of this order, any and all damages which they or any of them may sustain in the premises if complainant shall fail in this suit, or if it should be determined that this order has been and is improperly issued.

“If said complainant shall fail to abide by any of the foregoing conditions of this order, such failure shall be a sufficient reason for an application to this Court for a dissolution of this restraining order.

“AND IT IS FURTHER ORDERED that Francis Krull, a deputy clerk of this court, be, and he is hereby, appointed a special master in order to facilitate the return of any moneys that may be returnable hereunder to ascertain and report as to the amounts to be paid to each individual customer of complainant in the City and County of San Francisco and as to the identity of such claimant, and to draw, under the order of this Court, checks upon the aforesaid deposit to be made in The Bank of California, National Association, and that the fee and reasonable expense of such special master shall be borne by complainant. He is thus selected as

special master for the reason that the claimants of the fund will be extremely numerous and their identity and the amount of their claims will have to be established by incessant reference to the books of complainant, and such books can be most expeditiously and economically consulted by a special master who is an officer of this court."

On July 28, 1913, pursuant to stipulation by the parties, the District Court made the following order:

"Pursuant to the annexed stipulation of counsel, it is hereby

"Ordered, that the temporary restraining order heretofore made, dated and filed in this court the 24th day of June, 1913, be, and it is hereby modified so that the last sentence of the second condition thereof, being part of the last line of page 3 of said order and the first two lines of page 4 thereof, shall read as follows:

'All of such excess of rates collected by complainant during each calendar month shall be so deposited on or before the tenth day of the succeeding month.' "

On the first Monday in March, 1914, the amount of money on deposit with the bank in suit No. 21, pursuant to the orders hereinbefore set forth, was \$216,865.

There has been assessed to The Bank of California, National Association, on the assessment-roll of the City and County of San Francisco, State of California, for the fiscal [7] year 1914-1915, in volume entitled "Vol. 2, Unsecured Personal Property

1914," at page 16 of said volume, in the manner hereinafter set forth, the sum of \$216,865. In the said assessment The Bank of California, National Association, is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of Court of the impounded moneys in Equity Suit numbered 21, District Court of the United States, wherein The Pacific Telephone and Telegraph Company is plaintiff and City and County of San Francisco et al., defendants."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$4964.04.

No order appointing a receiver has been made in the suit hereinbefore referred to, unless the order appointing the special master and requiring the impounding of the excess moneys in the bank, as hereinbefore set forth, comes within that category, but said bank has at all times held said moneys on deposit subject to the conditions specified in the order of Court, as hereinbefore set forth.

The money deposited by The Pacific Telephone and Telegraph Company with the bank, as hereinbefore stated, has in no manner been kept as a separate or designated fund by said bank, but has been mingled with the general funds of the bank and credited by said bank to the suit in connection with which it has been deposited.

The bank has paid the one per cent tax assessed

against it for the fiscal years 1913-1914 and 1914-1915 under the provisions of Article XIII, Section 14, of the Constitution of California. [8]

Prior to the serving and filing of the notice of this motion on January 4, 1915, no application was made to the Court herein for an order directing the payment of the taxes assessed by the city as aforesaid. No such order was made, and such taxes have not been paid, and had not been paid on November 30, 1914, at six o'clock P. M. If said taxes then became delinquent and subject to the penalty provided by law, the amount of such penalty would be \$744.60, making a total of \$5708.64.

That The Pacific Telephone and Telegraph Company, the said complainant, is, and at all times since the commencement of the above-entitled suit has been, a corporation organized and existing under and by virtue of the laws of the State of California and doing a general public telephone and telegraph business in the City and County of San Francisco, throughout the State of California, and elsewhere; that a large number of interstate messages, both telephonic and telegraphic, are, and at all of said times have been, transmitted over the lines of said complainant, and particularly over the lines of complainant in the City and County of San Francisco, and running from said City and County to various points in the States of Oregon, Washington, Nevada and Arizona; that complainant is a "telegraph and telephone company" within the meaning of Section 14 of Article XIII of the Constitution of the State of California; that complainant is a "telegraph com-

pany" and a "telephone company" and a "telegraph and telephone company" within the meaning of the Act of the Legislature of the State of California entitled:

"An Act to carry into effect the provisions of section fourteen of article thirteen of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations, banks and insurance companies for the benefit of the state, all relating to revenue and taxation." [9]

approved April 1, 1911, and the various acts amendatory thereof;

That the said sum of \$216,865, being the sum mentioned in said affidavit of Edward F. Bryant, was collected by complainant from its rate-payers and was deposited by complainant with The Bank of California, National Association, a corporation, in accordance with said temporary restraining order made herein by the above-entitled Honorable Court on the 23d day of June, 1913, which said order is hereby referred to and made a part hereof; that in order to prevent the enforcement of the rate ordinances in said bill of complaint complained of, the said complainant was obliged to make such deposit and to keep said sum on deposit on the first Monday in March, 1914; that complainant claims, but the tax collector and respondents do not admit, that said sum on the first Monday in March, 1914, was, ever since has been, and now is a part of the prop-

erty of complainant, used exclusively in the operation of its telephone business within said state and more particularly within the City and County of San Francisco, and was, has been and is reasonably necessary for use by complainant, as such telephone company, exclusively in the operation and conduct of such telephone business.

That under and by virtue of said section of said Constitution and of said acts of said Legislature, the taxes levied upon complainant, as therein provided, are entirely and exclusively for state purposes, are levied, assessed and collected by the officers of said state directly, and not by the officers of the City and County of San Francisco, and are, as therein expressly provided, in lieu of all other taxes and licenses, state, county and municipal, upon the property there enumerated; that the tax provided for by said section and by said acts was, prior to the 1st day of [10] January, 1915, computed at the rate of 4.2% of the actual gross revenue of complainant from its business in California; that the gross revenue of complainant from said business in the year 1913, as reported by complainant to the State Board of Equalization, in accordance with said acts, was \$12,311,894.09. That in accordance with said section and said acts the officials of said state levied upon complainant for the year 1914 a tax in the sum of \$517,099.55. That on the 17th day of August, 1914, there became due from complainant to said state, and complainant paid to said state as the first installment of said tax, the sum of \$258,549.78. That there is included in said sum of \$12,311,894.09

reported as aforesaid by complainant, upon which said tax was computed, the sum of \$179,974.54, being that portion of the aforesaid sum of \$216,865, which accrued during the year 1913.

That said tax collector and respondents claim, but complainant does not admit, that complainant erred in returning to said State Board of Equalization said sum of \$179,974.54 as part of its gross revenue. That complainant claims, but said tax collector and respondents do not admit, that the tax of \$4,964.04 mentioned in said affidavit of Edward F. Bryant is invalid in this, that the imposition thereof is prohibited by said section and by said act above mentioned, and further, in this that the imposition thereof is double taxation, complainant having already paid the tax thereon.

That the Bank of California, National Association, the corporation above and in said affidavit mentioned, is a banking association organized under the laws of the United States; that said corporation is not authorized to act as receiver, and has never so acted, unless its position in this matter constitutes a receivership.

That complainant claims, but the tax collector and [11] respondents do not admit, that said tax of \$4,964.04 is invalid in this, that while said assessment purports to have been made under and in pursuance of Section 3647 of the Political Code the same was not so made, and that said sum of \$216,865. was not in the possession of any county treasurer, court, county clerk or receiver, and was not assessed to any treasurer, clerk or receiver.

That complainant claims, but said tax collector and respondents do not admit, that said tax is invalid in this, that it is a tax levied upon a national banking association contrary to the provisions of Section 5219 of the Revised Statutes of the United States.

That complainant claims, but said tax collector and respondents do not admit, that said tax is invalid in this, that if the same is levied in accordance with Section 3647 of the Political Code, said section is unconstitutional and void as an interference by the state government with an officer of a court of the United States organized under the Constitution of the United States.

H. D. PILLSBURY,

Solicitor for Complainant.

PILLSBURY, MADISON & SUTRO,

Of Counsel for Complainant.

PERCY V. LONG,

Solicitor for Respondents,

PERCY V. LONG,

City Attorney,

Solicitor for Tax Collector.

[Endorsed]: Filed Jun. 21, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [12]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, THE
BOARD OF SUPERVISORS OF THE
CITY AND COUNTY OF SAN FRAN-
CISCO, and PAUL BANCROFT, GUIDO
E. CAGLIERI, ANDREW J. GALLAG-
HER, GEORGE E. GALLAGHER, A. H.
GIANNINI, J. EMMET HAYDEN, FRED
L. HILMER, OSCAR HOCKS, THOMAS
JENNINGS, ADOLPH KOSHLAND, BY-
RON MAUZY, RALPH McLERAN,
CHARLES A. MURDOCK, WILLIAM H.
McCARTHY, DANIEL C. MURPHY, ED-
WARD I. NOLAN, HENRY PAYOT and
ALEX T. VOGELSANG, Members of and
Constituting the Board of Supervisors of the
City and County of San Francisco, and
JAMES ROLPH, JR., Mayor of said City
and County of San Francisco,

Respondents.

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,

Intervenor.

Petition for Allowance of Appeal.

Now comes THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, complainant above-named, and conceiving itself aggrieved by the order and decree of the above-entitled court made and entered by said court in the above-entitled cause on the 16th day of February, 1915, wherein and whereby it was ordered, adjudged and decreed that the application of Edward F. Bryant, Tax Collector [13] of the City and County of San Francisco, for an order directing the payment of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) to him out of the moneys impounded herein under the temporary restraining order made and entered herein on the 24th day of June, 1913, as and for taxes and penalties thereon, be granted, and wherein and whereby said Court ordered and directed the payment of said sum out of said moneys to said Edward F. Bryant, and ordered and directed Francis Krull, Esq., Special Master appointed herein, to draw a check upon The Bank of California, National Association, the depository of said moneys, payable out of said moneys, for said sum of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) in favor of said Edward F. Bryant, does hereby appeal from the said order and final decree of February 16, 1915, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herein and herewith, and petitions of said court to allow it, said complainant, to

prosecute an appeal to said United States Circuit Court of Appeals under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the bond which the complainant shall give and furnish upon said appeal, and that a transcript of the record, papers and proceedings upon which said order and final decree were made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

And petitioner will ever pray, etc.

Dated: June 23d, 1915.

H. D. PILLSBURY,

Solicitor for Appellant and Complainant.

PILLSBURY, MADISON & SUTRO,

Of Counsel.

[Endorsed]: Filed Jun. 23, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Complainant.

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Respondents.

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,

Intervenor.

Assignment of Errors.

Now comes THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, complainant in the above-entitled suit, by its undersigned solicitor, and says that in the record, proceeding and order made and entered in this suit on the 16th day of February, 1915, wherein and whereby it was ordered, adjudged and decreed that the application of Edward F. Bryant, Tax Collector of the City and County of San Francisco, for an order directing the payment of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) to him out of the moneys impounded herein under the temporary restraining order made and entered herein on the 24th day of June, 1913, as and for taxes and penalties thereon, be granted, and wherein and [15] whereby said Court ordered and directed the payment of said sum out of said moneys to said Edward F. Bryant, and ordered and directed Francis Krull, Esq., Special Master appointed herein, to draw a check upon The Bank of California, National Association, the depository of said moneys, payable out of said moneys, for said sum of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) in favor of said Edward F. Bryant, there is manifest error, in that the said complainant has been denied its just rights by the order entered by said District Court, and the said complainant hereby assigns and

sets out separately and particularly the following errors, viz:

I.

The Court erred in refusing to deny the application of the City Attorney of the City and County of San Francisco, State of California, as attorney for the tax collector of said city and county, for an order of the above-entitled court directing the payment of the taxes levied and assessed against the above-named the Bank of California, National Association, as receiver and depository of moneys in litigation in the above-entitled suit.

II.

The Court erred in making its order directing that the sum of \$5,708.65 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of sums deposited in the Bank of California, National Association, subject to the order of said Court in the above-entitled suit, and in further ordering Francis Krull, Special Master [16] in Chancery in said suit, draw his check upon said the Bank of California, National Association, for the payment of said sum of \$5,708.65, as taxes and penalties out of the sum deposited and impounded in said The Bank of California, National Association, as aforesaid.

III.

The Court erred in making said order and in holding and deciding that said taxes were assessed and levied in accordance with section 3647 of the Political Code of California.

IV.

The Court erred in making said order and in holding and deciding that said moneys, deposited in said The Bank of California, National Association, as aforesaid, were moneys in litigation in the possession of said The Bank of California, National Association, as receiver.

V.

The Court erred in making said order and in holding and deciding that said taxes were assessed and levied upon certain sums received by The Bank of California, National Association, as a receiver and depositary in accordance with orders heretofore made in the above-entitled suit by the above-entitled court.

VI.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed.

VII.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed as moneys in litigation in the possession of said The [17] Bank of California, National Association, as receiver.

VIII.

The Court was without jurisdiction to make said order, or any order directing payment of taxes out of said moneys, because it appears from the undisputed facts of the case that said moneys were deposited by complainant with said The Bank of California pursuant to orders of Court in the above-entitled suit, that said moneys should be returned to complainant

in the event complainant was successful in said action, or, in the event that the charges collected by complainant should be held excessive, that said moneys should be refunded to the persons from whom they were collected.

IX.

The Court erred in making said order, because it appears from the undisputed facts of the case that said The Bank of California, National Association, had paid the one per cent tax assessed against it for the fiscal year 1913-1914 under the provisions of Article XIII, Section 14, of the Constitution of California.

X.

The Court erred in making said order, because it appears from the undisputed facts of the case that said moneys were a part of the operative property of complainant, and, as such, under the provisions of Article XIII, Section 14 of the Constitution of California, not subject to taxation by the City and County of San Francisco.

XI.

The Court erred in making said order, because it appears from the undisputed facts of the case that complainant [18] had, at the time said order was made, already paid all the taxes due upon said moneys.

XII.

The Court erred in making said order, because the same subjected said moneys to double taxation.

XIII.

That the Court erred in making said order, be-

cause said Section 3647 of the Political Code, under which it was attempted to assess said tax, does not apply to moneys in the hands of officers of this court, and, if it did so apply, would be unconstitutional as an interference by the state government with the courts of the United States.

XIV.

That the Court erred in making said order, and more particularly, in directing the payment of said penalties amounting to \$744.60, because, if said Section 3647 of the Political Code authorizes the assessment of said taxes, said section provides the only method for the collection thereof, and the other provisions of said Code, imposing penalties for the failure to pay taxes upon the delinquency thereof, have no applicaotin to taxes so levied and assessed.

XV.

The Court erred in making said order because it appears from the undisputed facts of the case that said The Bank of California, National Association, was a banking association incorporated under the National Bank Act.

WHEREFORE, said complainant, The Pacific [19] Telephone and Telegraph Company, prays that the order of the above-entitled court be set aside and that an order be entered denying the aforesaid application.

Dated San Francisco, California, June 23d, 1915.

H. D. PILLSBURY,

Solicitor for Complainant.

PILLSBURY, MADISON & SUTRO,

Of counsel.

[Endorsed]: Filed Jun. 23, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation et al.,
Respondents,

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,
Intervenor.

**Order Permitting an Appeal and Fixing Amount of
Cost Bond on Appeal.**

WHEREAS, in the District Court of the United States, Ninth Circuit, Northern District of California, on the 16th day of February, 1915, an order was made and entered in the above-entitled cause, wherein and whereby it was ordered, adjudged and decreed that the application of Edward F. Bryant, Tax Collector of the City and County of San Francisco, for an order directing the payment of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) to him out of the moneys impounded herein under the temporary restraining order made and entered herein on the 24th day of June, 1913, as and

for taxes and penalties thereon, be granted, and wherein and whereby said Court ordered and directed the payment of said sum out [21] of said moneys to said Edward F. Bryant, and ordered and directed Francis Krull, Esq., Special Master appointed herein, to draw a check upon The Bank of California, National Association, the depositary of said moneys, payable out of said moneys, for said sum of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) in favor of said Edward F. Bryant; and

WHEREAS, the Pacific Telephone and Telegraph Company, a corporation, complainant in said cause, has, on this 23d day of June, 1915, filed its petition for the allowance of an appeal from said order to the United States Circuit Court of Appeals, Ninth Circuit, together with an assignment of errors, in and by which said petition it has prayed that an order be made fixing the amount of the cost bond which it shall give and furnish on said appeal;

Now, therefore, in consideration of the premises, and good cause appearing therefor, it is ORDERED that said appeal be, and the same is hereby, permitted and allowed.

It is further ORDERED that the said the Pacific Telephone and Telegraph Company, a corporation, complainant herein, shall file its undertaking and cost bond in form and substance conditioned and with sureties in accordance with the provisions of the law and the rules and practice of this court in the said United States District Court in the sum of \$300, which said bond and sureties thereon shall be ap-

proved before filing, and said amount is hereby fixed as the amount [22] of said bond. Said bond will be approved by a judge of this court.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Jun. 23, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Respondents,

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,
Intervenor.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, a corporation, as prin-
cipal, and UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation organized
under the laws of the State of Maryland, and duly
authorized to execute bonds and undertakings in

judicial proceedings pending in the courts of the United States, as surety, are held and firmly bound unto the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, the Board of Supervisors, the Mayor, and the Tax Collector of said city and county, in the full and just sum of Three Hundred Dollars (\$300), lawful money of the United States, to be paid to the said City and County of San Francisco, a municipal corporation, the Board of Supervisors, the Mayor and the Tax Collector of said city and county, to [24] which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors, representatives and assigns firmly by these presents.

Sealed with our seals, and dated this 23d day of June, 1915.

WHEREAS, the above-named complainant, the Pacific Telephone and Telegraph Company, a corporation, has obtained from the District Court of the United States, Northern District of California, its order allowing said complainant to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse an order made and entered in the above-entitled suit, wherein and whereby it was ordered, adjudged and decreed that the application of Edward F. Bryant, Tax Collector of the City and County of San Francisco, for an order directing the payment of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) to him out of the moneys impounded herein under the temporary restraining order made and entered herein on the

24th day of June, 1913, as and for taxes and penalties thereon, be granted, and wherein and whereby said Court ordered and directed the payment of said sum out of said moneys to said Edward F. Bryant, and ordered and directed Francis Krull, Esq., Special Master appointed herein, to draw a check upon The Bank of California, National Association, the depository of said moneys, payable out of said moneys, for said sum of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) in favor of said Edward F. Bryant:

Now, therefore, the condition of this [25] obligation is such that if the above-named complainant, the Pacific Telephone and Telegraph Company, a corporation, shall prosecute such appeal to effect, and answer all costs if it shall fail to make good said plea, then this obligation shall be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF, said The Pacific Telephone and Telegraph Company, a corporation, has caused these presents to be executed by its president and secretary thereunto duly authorized, and its corporate seal to be hereunto affixed, and said United States Fidelity and Guaranty Company, a corporation, has caused these presents to be executed by its attorney in fact, thereunto duly authorized,

and its corporate seal to be hereunto affixed, this 23d day of June, 1915.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

By G. E. McFARLAND, (Seal)
President.

[Seal] By F. W. EATON,
Secretary.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

W. S. ALEXANDER,

By B. F. CATOR,
Attorney in Fact.

The foregoing bond is hereby approved this 23d day of June, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jun. 23, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Complainant.

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,

Respondents,

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,

Intervenor.

Praeceptum (for Transcript of Record).

The Clerk of the above-entitled court will please prepare a transcript of the record for the Appellate Court in the above-entitled cause, and is directed to insert therein the following:

(1) The notice of motion for an order directing the payment of taxes on the impounded moneys.

(2) The agreed statement heretofore filed in the above-entitled cause on June 21st, 1915.

(3) The order of Court directing that the sum of \$5,708.65 be paid to the tax collector of the City and County of San Francisco, State of California, out of certain sums deposited with the Bank of California, National Association, subject to the orders of the above-entitled court in the above-entitled suit. [27]

(4) The opinion of the Honorable Wm. C. Van Fleet rendered upon the hearing of said notice.

(5) All papers filed by complainant, the Pacific Telephone and Telegraph Company, a corporation, in the prosecution of its appeal, including petition for appeal, assignment of errors, order permitting appeal, and citation on appeal, the appeal bond and the approval of the same.

H. D. PILLSBURY,

Solicitor for Complainant.

PILLSBURY, MADISON & SUTRO,

Of Counsel.

[Endorsed]: Filed Jun. 25, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk.
[28]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 21.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
et al.,

Defendants.

**Certificate of Clerk U. S. District Court to Record on
Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing twenty-eight pages, numbered from 1 to 28, inclusive, to be full, true and correct copies of Notice of Motion for Order to Pay Taxes; Order Granting Motion for Payment of Taxes; Oral Opinion on Motion; Stipulation as to Facts; Petition for Appeal; Assignment of Errors; Order Allowing Appeal and fixing amount of Bond on Appeal; Bond on Appeal; and Praecipe for Transcript of Record, as the same remain of record and on file in the office of the clerk of said court, and that the same constitute a record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of Transcript of Record on Appeal is \$17.80; that said amount was paid by Pillsbury, Madison & Sutro, attorneys for the plaintiff, and that the original Citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of August, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk, United States District Court, Northern Dis-
trict of California.

[Ten Cent Internal Revenue Stamp Cancelled
Aug. 13, 1915. W. B. M.] [29]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States to the City and County of San Francisco, a Municipal Corporation, the Board of Supervisors of the City and County of San Francisco, and Paul Baneroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, Ralph McLeran, Charles A. Murdock, William H. McCarthy, Daniel C. Murphy, Edward I. Nolan, Henry Payot and Alex T. Vogelsang, Members of and constituting the Board of Supervisors of the City and County of San Francisco, and James Rolph, Jr., Mayor of said City and County of San Francisco, Greeting:

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Appellant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Appellees.

**Order Extending Time to [August 21, 1915, to] File
Record and to Docket the Cause.**

Good cause appearing therefor, it is ordered that the appellant may have to and including the 21st day of August, 1915, within which to file its record on appeal and to docket the cause in the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated: July 22, 1915.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. 2637. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific Telephone and Telegraph Company, a corporation, vs. The City and County of San Francisco, a municipal corporation, et al. Order extending time to file Record on Appeal, etc. Filed Jul. 22, 1915. F. D. Monckton, Clerk. Refiled Aug. 14, 1915. F. D. Monckton, Clerk. [32]